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On Legal Positivism's Word and our 'Form-of-(non-)Living'

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Abstract:

This paper is about two stories. The more reassuring one states that by establishing that a norm is valid because of its source, not its merit, legal positivism is, in its various forms, perhaps one of the greatest achievements in Western legal theory and practice. From constitutionalism to human rights policies, from criminal to international law and free trade agreements, from contracts to torts and e-commerce, legal validity, predictability, and coherence have found their most powerful ally in positivist thought. This contribution argues that it is time for a different, neorealist story: the metaphysical, ontological and biopolitical essence of its language demonstrates that legal positivism has in fact played a fundamental role in the substitution of action with behaviour, and consequently, in the normalisation of humankind's self-annihilating animality as post-historical and post-political 'form-of-(non-)living.'

Keywords: Legal positivism, legal language, liberal thought, reasons for action, *Homo juridicus*

Something else is more weighty,
and that is, whether there ever is such a thing as speaking about language¹

¹ M. HEIDEGGER, 'A Dialogue on Language', in *On The Way to Language*, Peter D. Herts trans., London, 1982 [1959], pp. 1–54, at 50.

To restore the thing itself to its place in language and, at the same time,
to restore the difficulty of writing ... this is the task of the coming philosophy²

1 Introduction

Notably, legal positivism's (LP) scope is to legitimise law's authoritarian regulative instances by providing them with an institutional ground of reference. While it is beyond dispute that modernity has been LP's golden age, current global and transnational processes of diversification or fragmentation – i.e., the pluralisation of regulative sources and norm-setting bodies at the macro, meso, and micro levels – appear to undermine LP's assumptions, as well as threaten its capacity to achieve its aims. The failure to institutionalise (and, thus, posit) the rules that permeate global society's workings as well as the spread of hybrid functional equivalents to law could be used to support this view.

This paper aims instead to demonstrate that LP's rationalism and the diffusionist regulatory landscape that characterises our liberal global age meet in a zone of interaction: namely, the behaviouralisation of human existence and relations. In particular, I submit that LP has normalised humankind's behavioural 'form-of-(non-)living' as prompted by the theological and liberal traditions. In so doing, LP has played a fundamental role in the de-politicisation and de-juridification of the world. As this paper draws upon my recent critique of LP's constructivist approach to normative phenomena³ and the liberal global-order project,⁴ both its premise and the unconventional negative terms that I will use in the following pages require some preliminary clarifications.

When criticising the practical effect of the liberal conception of human existence and relations, I argued that Westerners currently '(non-)live' in a sort of 'global Eden'—that is, in the global aspatial '(non-)dimension' in which what constitutes human uniqueness in Arendtian terms makes no appearance. This claim was also supported by offering a juridical contextualisation of Heidegger's and Agamben's scholarship on what differentiates human comportment from animal behaviour. The aim was to set out some of the juridical implications of our 'form-of-(non-)life'. By this term, I refer to our alienated form of

² G. AGAMBEN, 'The Thing Itself', in *Potentialities: Collected Essays in Philosophy*, Daniel Heller-Roazen trans. and ed., Stanford, 1999 [1984], pp. 27–38, at 38.

³ Author

⁴ Author

existence in which we no longer *act* but merely *behave* according to liberalism's reason-oriented mechanisms of societal interaction. The movement towards this sort of Kojèvean post-historical (that is, animal) condition⁵ is in fact taking place through the formal depoliticisation and de-juridification of the world—or in other words, through the substitution of government with the administrative and economics-oriented paradigm of liberal global governance. As a result, the jurist's anthropological and socio-political function of interpreting normativistically our actions is no longer needed.

On those occasions, I also showed that while, from a genealogical point of view, our shared behaviouralisation finds its origin in the extent to which the sterile *technē oikonomikē* has penetrated the domain of the political, the liberal roadmap of global standardisation extends this process beyond national boundaries through the alignment of particular forms of cultural sensibility to the Western (and in particular, Anglo-American) model of societal interaction and development. As a result, in this system of perfect contemplation of *objective regularities* rather than *subjective irregularities*, of *language* rather than *languages*, we do not have sense of our living experience because we do not come to birth, persist, die as 'someone'—a consequence of the liberal aim to achieve perfect order and political freedom from the chaos that affects the condition of the state of nature (*homo homini lupus*).

Finally, building on Arendt, MacPherson, and Agamben, I maintained that the same commentators who welcome the post-nationalisation of our societal relations fall short when it comes to recognising that the establishment of the modern state is, in fact, one of the West's greatest artifices: the same (exceptional) sovereign contractual-constitutionalising process of pure, immediate, and simultaneous 'potentiality' and 'actuality' that led to the *essential* positivistic formation of the modern form of polity, and whose mythical humanitarian façade was aimed at guaranteeing our *existential* political freedom through safety (*homo homini deus*), contained in itself the seed of the universalisation of man's self-annihilating animality. Consequently, and despite what is commonly taught by legal

⁵ A KOJÈVE, *Introduction to the Reading of Hegel*, Allan Bloom ed., James H Nichols Jr trans., New York, 1980 [1979].

pluralists, there is no need to ‘detach’ the law from the state,⁶ and the fall of the ‘bipolar system’ ought to be seen as the first neorealist achievement of the liberal totalising strategy.⁷

What will be claimed in the following pages on the link between the behaviouralisation of humankind’s existence and the intrusion of the positivist tradition into the legal domain falls within this neorealist perspective of inquiry. According to the story that this paper aims to challenge, LP is, in its various forms (i.e., authoritarian, conventionalist, inclusive, exclusive, ideological, methodological, scientific, legislative, *etc.*), perhaps one of the greatest achievements of Western legal theory and practice. This is so because LP maintains that a norm is valid because of its source, not its merit.⁸ Thus, we are told, from constitutionalism to human rights policies, from criminal to international law and free-trade agreements, from contracts to torts and e-commerce, legal validity, predictability, and coherence have found their most powerful ally in positivist thought. Yet I argue that if we are to understand how LP’s word has ‘*norm-alised*’ our animal condition, we need to rediscover what constitutes human uniqueness and combine it with law’s anthropological special domain and sociopolitical regulative promises from a wholly new perspective.

As scholarship on legal language and jurilinguistics is well-established,⁹ the analysis that this paper proposes might be deemed unnecessary. Yet what sets this account apart is that it aims

⁶ N. MACCORMICK, *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth*, Oxford, 2008 [1999], p. v. As this paper contends, authority has disappeared long before the taking place of what conventional narratives describe as its post-national ‘fragmentation’.

⁷ Author

⁸ I borrow this definition from J. GARDNER’S *Law as a Leap of Faith*, Oxford, 2012, 19–53.

⁹ For an introduction, and in addition to the *International Journal for the Semiotics of Law - Revue internationale de Sémiotique juridique*, see B. S. JACKSON, *Semiotics and Legal Theory*, London, 1985; P. GOODRICH, *Reading the Law. An Introduction to Legal Methods and Techniques*, Hoboken, 1986; *ibid*, *Languages of Law. From Logics of memory to Nomadic Masks*, London, 1990; C. DOUZINAS, R. WARRINGTON, and S. MCVEIGH, *Postmodern Jurisprudence. The Law of the Text in the Texts of Law*, London, 1993 [1991]; Brian Bix, *Law, Language and Legal Determinacy*, Oxford, 1993; J.P. GIBBONS (ed.), *Language and the Law*, London, 1994; A. MARMOR, ‘The Immorality of Textualism’, *USC Legal Studies Research Paper No. 05-5*; *ibid*, ‘What Does the Law Say? Semantics and Pragmatics in Statutory Language’, *USC Law Legal Studies Paper No. 07-9*; *ibid*, ‘Can the Law Imply More than it Says? On Some Pragmatic Aspects of Strategic Speech’, *USC Law Legal Studies Paper No. 09-43*; *ibid*, *Social Conventions: From Language to Law*, Princeton 2009; A. WAGNER, W. WERNER, and D. CAO (eds.), *Interpretation, Law and the Construction of Meaning*, New York, 2007; C. HUTTON, *Language, Meaning, and the Law*, Edinburgh, 2009; G. L. McDowell, *The Languages of Law and the Foundation of American Constitutionalism*, Cambridge, 2010; P. M. Tiersma and L. M. SOLAN (eds.),

to show that the dissolution of the distinction between action and behaviour in favour of the latter would have not been possible without the artifice put forward by LP's language. Instead of focusing, as legal positivists have done, on its 'norm,' the present contribution offers a neorealist¹⁰ contextualisation of LP's enterprise by illustrating some of the consequences of the illusion perpetrated by the metaphysical and ontological essence of its 'word' and the pervasive structure with which it has been provided.

This paper is structured as follows. Section II sets the level of argument by introducing the reader to the processes through which LP's reason-oriented linguistic symbolism has normalised the substitution of action with behaviour. Attention is paid to how the positivist tradition has targeted the decisive anthropological and sociopolitical relationship between *jus-dicere* and the individual's *active* will. The discussion focuses on an analytico-linguistic study of qualitative data, and in particular on the textuality and legal phraseology of selected positivist scholarship on both sides of the Atlantic. Taking this one step farther, Section III addresses the relationship between the lexical artifice that LP perpetrated and the performative working logic of its dualistic apparatus of *primary* and *secondary* causes from the perspective of Agamben's and Heidegger's philosophy of language and political roadmap. In the same context, it is shown that if we live in the post-historical and post-political age, it is because the substitution of action with behaviour has determined the absorption of authority by power. Concluding remarks will follow.

2. Action or Behaviour?

2.1. Setting the Level of Argument

What this paper claims cannot be evaluated (and eventually criticised) if we do not first comprehend that *homo juridicus* does not necessarily behave, per se.¹¹ *Homo juridicus* behaves primarily when planning is of the essence, such as when more or less organisation is

The Oxford Handbook of Language and Law, Oxford 2012; J. BROEKMAN and L.C. BACKER, *Lawyers Making Meaning: The Semiotics of Law*, Dordrecht, 2003; J. HUSA, 'Understanding Legal Languages: Linguistic Concerns of the Comparative Lawyer', in J. BAAJI (ed.), *The Role of Legal Translation in Legal Harmonization*, Alphen aan den Rijn, 2012, pp. 161–81; M. MAC ADOAH (ed.), *Legal Lexicography. A Comparative Perspective*, Aldershot, 2014.

¹⁰ F. D'AGOSTINI, *Realismo? Una Questione Non Controversa*, Turin, 2014.

¹¹ Author

required for the realisation of crime or a tort, or for a purchase. Yet even in such cases, behaviour may turn out to be action in the very last frames of the agent's conduct. What we can be sure about, however, is that there are cases in which *homo juridicus* simply acts, such as when the crime, tort, or purchase is the result of a self-affirming decision. Conversely, a person who merely behaves is, by stipulative definition, *homo oeconomicus*.¹² This may sound strange, considering the number of studies and game theories posited in law and economics and the relevance these have gained in legal theory and practice. The point, however, is that man is the animal who *reasons* and speaks, or, as Heidegger would specify, *says* (to be intended as a relational unity of listening to, and speaking of, the thought-of-Being¹³). Yet this merely defines human *qua* human;¹⁴ it does not define me, nor the reader of these words, nor anybody else. It only defines humankind as a *species*, thus helping the interpreter to differentiate it from its animal and vegetable counterparts.¹⁵ Agamben understood this fully and, not coincidentally, placed this truth at the centre of the Messianic redemption he urged.¹⁶

This is why, in one of his major critiques of liberal thought, Paul W. Kahn has contended that 'reason is not self-defining'.¹⁷ When we pursue our own *interest*, that is, when we let our

¹² Ibid.

¹³ M. HEIDEGGER, 'The Nature of Language' and 'The Way to Language', in *On the Way to Language*, supra note 1, pp. 57–108 and pp. 111–36 respectively. See also *ibid.*, 'Letter on Humanism', in *Basic Writings*, David Farrell Krell ed., London, 2008 [1947], pp. 217–65, at 220 and 265; *ibid.*, *Introduction to Metaphysics*, Gregory Fried and Richard Polt trans. and eds., New Haven, 2014 [1953], p. 184 and p. 192; *ibid.*, 'The Thing', in *Poetry, Language, Thought*, Albert Hofstadter trans., New York, 2013 [1954], pp. 163–84, at 182; *ibid.*, 'Language' 187–208, at 208; *ibid.*, *What is Called Thinking?*, J. Glenn Grady trans., New York, 2013 [1954], p. 13; *ibid.*, *Identity and Difference*, Joan Stambaugh trans., Chicago, 2002 [1957], p. 31; *ibid.*, 'The Word of Nietzsche: "God is Dead"', in *Question Concerning Technology*, William Lovitt trans., London, 2013 [1952] 57; *ibid.*, *The Principle of Reason* (Reginald Lilly trans. Indianapolis, [1957] 1996; *ibid.*, *Parmenides* (André Schuwer and Richard Rojcewicz trans., Indianapolis, 1998 [1982], p. 77, p. 104, p. 114, and pp. 148–63; *ibid.*, *Contributions to Philosophy (Of the Event)*, Richard Rojcewicz and Daniela Vallega-Neu trans., Indianapolis, 2012 [1989], p. 5; *ibid.*, *The Event*, Richard Rojcewicz trans., Indianapolis, 2013 [2009], p. 162.

¹⁴ Hannah Arendt would instead speak of 'Man'. See *The Human Condition*, Chicago Press, 1998 [1958], p. 8.

¹⁵ Heidegger, of course, would not agree—which is why, as will emerge in the conclusive part, his insights may only partially serve the cause of this article.

¹⁶ G. AGAMBEN, *Profanations*, Jeff Fort trans., Cambridge, MA, 2007 [2005], pp. 55–60. To be treated in Section III.

¹⁷ P. W. KAHN, *Out of Eden. Adam and Eve and the Problem of Evil*, Princeton, 2010 [2007], p. 175. See also *Putting Liberalism in Its Place*, Princeton, 2008 [2005].

attitude be determined by the outcome of a *rational* calculation (Heidegger would call it the ‘calculating self-adjustment of *ratio*’), we do not *actively* decide for and against something or someone but merely dwell in what we should perhaps define as a procedural—as opposed to absolute—truth. It is thus not a coincidence that, when dreaming of a perpetual peace, Kant turned the self-annihilating feature of reason into a universal law. This is why the Kantian notion of coercion¹⁸ does not require ‘the *personality* of those who are subject to it’.¹⁹ Thus, to claim that it is ‘normative reason ... that *counts in favor of* or *justifies* an action or an attitude (such as a belief, desire, or intention)’²⁰ is pure neo-Kantianism.

A human, however, defines him/herself as ‘that’—as opposed to ‘another’—person only when s/he lets the sovereign, self-affirming conflict between *velle* and *nolle* take place and then acts accordingly. The *act* of (per)forming our volitions is indeed what defines both the essence of willpower and our existential uniqueness and plurality in Arendtian terms. Consequently, to speak of ‘rational action’ is an oxymoron that reproduces the fallacy of metaphysical thought: action is as never rational, nor predictable, as behaviour is.²¹ To be self-defining, action must be groundless, boundless, and unpredictable. Every time we (try to) provide action with a reason, we are in fact transforming it into behaviour as the distinction between the two is not a *quantitative* but a *qualitative* one; that is, what matters is what lies behind the signification of our conduct, or, we might say, its anthropological and philosophical negativity. What defines behaviour is therefore not the replication of our *activities* in a more-or-less systematic, coordinated, and consistent fashion (what Bergson would call ‘habit-memory’), but whether or not our conduct is grounded in reason and/or interest in the first place.

The fact that, as will be discussed below when comparing Marmor’s suggestions to those of Varro, ordinary regularities do not require a rule should be analysed from this perspective. This explains why the anthropological and sociopolitical role of the jurist, among whom stands the judge, is that of ‘*norm-alising*’ our actions in so creating, protecting and promoting social order. This is how, through the jurist’s existentialist function, law performs its essential regulative instances and becomes *the* law. Many would deem this understanding of law’s

¹⁸ J. D. CAPUTO, *On Religion*, London, 2001, p. 49.

¹⁹ See L. BERND, ‘Sympathy for the Devil(s)? Personality and Legal Coercion in Kant’s *Doctrine of Law*’ (2015) 6(1) *Jurisprudence* 25. Emphasis added.

²⁰ D. PLUNKETT, ‘A Positive Route to Explain How Facts Make Law’ (2012) 18(2) *Legal Theory* 139, 158.

²¹ Author

functioning reductive. Among them would probably stand Leslie Green, as in his long opposition to conventional LP he has endeavoured to demonstrate that ‘law does much more than coordinate action’.²² This is indubitably true: as Green writes, ‘law should also do justice, provide goods and services, express sound values, and so on’.²³ This view is shared by many conventionalists as well, Andrei Marmor among them.²⁴ What should be noted, however, is that none of this—nor any authoritarian and regulative claims that the law might possibly have—would be successful without the interference of the jurist over the (*actively decisive*) unpredictability of what makes us human. For this to happen, the jurist needs first to interpret normativistically the individual’s *active* will and then, through the formulation of (and answer to) a *quaestio juris*, hold ‘that’ individual accountable for the consequences of her/his sovereign choice²⁵—the only exception to this process being, not coincidentally, when the individual’s conduct assumes the features of a (negligent, unintentional, etc.) behavioural outcome such as when in Criminal law the *mens rea* is displaced from view. In contrast to this, the mechanical rationalisation of human conduct prompted by liberal thought has nullified action’s essence in favour of behaviour in thus draining humans’ existentialist self-definition and leading to what Agamben has defined as the ‘animality of man in post-history’.²⁶

2.2. The Linguistic Artifice

This paper’s main claim is that LP’s rationalism has normalised our behaviouralisation by offering it an institutional basis of legitimation. More precisely, legal positivists have done so by transplanting into the legal dimension the following things: 1) the liberal conception which, notwithstanding liberalism’s humanitarian façade, understands man as a behavioural (and replaceable) contracting unit, and 2) the ‘authority-power’ dichotomy which informs the metaphysical and ontological structure of the Western politico-theological tradition. The

²² L. GREEN, ‘Positivism and Conventionalism’ (1999) 12(1) *Can. J. L. Jur.* 35, 42. See also Gardner, *supra* note 8, pp. 205–18, 272; K. BROWNLEE, ‘On Gardner on Law in General’ (2015) 6(3) *Jurisprudence* 567.

²³ *Ibid.*, p. 52.

²⁴ In Marmor’s words, ‘[i]t is just puzzling, however, and simply groundless, to maintain that coordination is all that the law does’, in *Positive Law and Objective Values*, Oxford, 2001, p. 48. See also below note 43.

²⁵ Author

²⁶ G. AGAMBEN, *The Open. Man and Animal*, Kevin Attell trans., Stanford, 2004 [2002], p. 12.

following reflections deal with the first component of my claim. I shall discuss the second one in Section III.

Hart criticised ‘the simple model of law as the sovereign’s coercive orders’ for its descriptive deficiencies as, in his words, it did not ‘fit the facts’.²⁷ Yet for our purposes, the same may be said about LP, broadly understood. Countless examples may be quoted to support this view. A good start would be to reflect on why Agamben is of the opinion that Kant’s aforementioned ontological illusion found its greatest expression in Kelsen’s pure theory of (public) law and notion of sovereignty—that is, in the positivistic conception that sees ‘[t]he relationship between norm and behaviour ... not [as] a relation of being but a relation of having-to-be’²⁸). The term ‘behaviour’, I contend, is obviously not casual, because what takes place with Kelsen’s normalisation of the Kantian categorical paradigm of operativity and command is the voiding of the subject’s free action as informed by the internal conflict from which the intentional choice between *velle* and *nolle* arises. What is neglected is thus the sovereignty of the will to perform the self-determination and comprehension of humans’ uniqueness through the affirmation or negation of a future project.²⁹

Analogous remarks may be made in relation to other accounts as well. In condemning Stephen Perry’s analysis of Hart’s internal perspective, Kramer argued that Hart did not

²⁷ HLA HART, *The Concept of Law*, Oxford, 2012 [1964], p. 79 and p. 80.

²⁸ G. AGAM BEN, *Opus Dei. An Archaeology of Duty*, Adam Kotso trans., Stanford, 2013 [2012], p. 124. Agamben further clarifies that even though Kant

believed himself to have secured . . . the possibility of metaphysics and to have founded, at the same time, an ethics that was neither juridical nor religious[, his] ontology is in truth an ontology of command [in which] the guarantee of the effectiveness of duty is . . . the law.

See also *ibid.*, p. 122, p. 123, and p. 112; Agamben, *supra* note 26, pp. 49–92, and below note 95; Hans Kelsen, *General Theory of Law and State*, Clarke, 1945, p. 3, according to whom ‘[l]aw is an order of human behaviour’. Similarly, to Hannah Arendt, Kant’s categorical imperative is apolitical because it is aimed at ‘persuad[ing] the will to accept the dictate of reason [by bringing] back the concept of obedience, through a back door as it were’. In ‘Some Questions of Moral Philosophy’, in *Responsibility and Judgement*, Jerome Kohn ed., New York, [1968] 2003, pp. 49–146, at 72. See also *ibid.*, *The Life of the Mind* Vol. II, New York, 1978 [1971], p. 63.

²⁹ As will emerge in due course, I am using the term ‘project’ neither as a synonymous with ‘plan’ nor ‘program’. See below note 60. On why Kant’s moral philosophy is logical, see below note 91.

‘plac[e] vagrant dogs and Holmesian bad men in the same category as committed officials’.³⁰ It may be doubted whether Agamben, or other philosophers and political theorists who have inquired into our animalisation and argued for a post-human ethics, such as Bunch,³¹ would agree. Hart’s is indeed a *reductive* practice theory, that is a positivist view that distinguishes between habits and social rules³² by reference to the (ontological, as Agamben would label it) internal aspect of compliance. In particular, Hart’s aim is to explain that law and legal phenomena depend on our acceptance of behavioural patterns as binding ‘general standards to be followed by the group as a whole’.³³ The merits and limits of Hart’s conception are well-known and have been discussed at length over more than five decades. For our purposes here, what should be noted is that Hart’s focus on the (rule-guided) regularities in the behaviour of a given group displaces the anthropological and philosophical essence of what makes us human—a consequence that may shed new light on the influence of the school of linguistic philosophy on Hart’s reasoning.³⁴ In other words, while Hart’s intention was to abandon Kelsen’s behavioural neo-Kantianism, his substitution of the *grundnorm* with the rule of recognition leads to the same self-annihilating outcome.

In addition, one could point out how the terms ‘action’ and ‘behaviour’ are constantly (and too easily) interchanged in Andrei Marmor’s reflections on the values and limits of coordination and constitutive conventions.³⁵ The same applies to his monograph on social

³⁰ M. H. KRAMER, *In Defense of Legal Positivism. Law Without Trimmings*, Oxford, 2007 [1999], p. 242.

³¹ M. BUNCH, ‘Posthuman Ethics and the Becoming Animal of Emmanuel Levinas’ (2014) 55(1) *Culture, Theory and Critique* 34.

³² Hart, *supra* note 27, pp. 55–61, 85–91, and 254–59. For a classic critique of Hartian reductionism, see R. SUMMERS, ‘Professor HLA Hart’s Concept of Law’ (1963) *Duke Law Journal* 629–70. As Summers, Dworkin, and others have made it clear, Hart’s dichotomy is problematic for a series of reasons. Unfortunately, a detailed analysis of Hart’s understanding of the similarities and differences between habits and social rules would fall outside the purview of this contribution. It would however prove worthwhile to address it through the lens of Rodolfo Sacco’s anthropological account in *Antropologia Giuridica*, Bologna, 2007. For a classic critique of Hart’s reductionism, see Robert Summers, ‘Professor HLA Hart’s Concept of Law’ (1963) *Duke Law Journal* 629–70.

³³ Hart, *supra* note 27, p. 56.

³⁴ R. H. S. TUR, ‘Variety or Uniformity?’, in L. DUARTE D’ALMEIDA, J. EDWARDS, and A. DOLCETTI (eds.), *Reading HLA’s ‘The Concept of Law’*, Oxford, 2013, pp. 71–112, at 71–75; L. GREEN, ‘The Concept of Law Revisited’ (1996) 94 *Michigan L Rev* 1687. See also Section III.

³⁵ Marmor, *supra* note 24, pp. 25–48.

conventions.³⁶ Importantly, Marmor seems to pay little attention to this antithesis in his *Philosophy of Law*, such as when he appears to underestimate the essence of what constitutes behaviour. By way of an example, Marmor writes that '[l]aw's essential character is prescriptive: It purports to guide *action*, alter modes of *behavior*, constrain the practical deliberation of its subjects; generally speaking, the law purports to give us *reasons* for *action*'.³⁷ That action does not, by definition, *need* a reason will be discussed below; what should be noted here is that Marmor's inaccuracy in the combination of action with behaviour is not without consequences. Indeed, when contending that '[c]onventions ... are social rules', Marmor specifies that '[r]ules should be distinguished from both regularities of behaviour and generally recognized reasons'.³⁸ Arguably, no one would dispute this categorisation, as Marmor is right in saying that '[n]ot everything we do regularly we do as an instance of *following a rule*'.³⁹ The example of eating breakfast that Marmor puts forward to support his point is certainly convincing. The difficulty, however, emerges when we try to overlap these words with what Marmor argued in another work of his—that 'practices are rule-governed *activities*'⁴⁰ and that '[w]e have a social practice when a certain type of human *activity* is either constituted or at least largely governed by rules or conventions'.⁴¹ Should we give priority to the latter set of statements, we would wonder not only whether the *regular practice* of eating at breakfast is, in fact, rule-governed, but also whether eating at breakfast is a (rule-independent?) *behavioural* input or a (rule-governed?) *activity* in the first place.

Yet it could be conceded that Marmor's approach to why constitutive conventions are both behaviour-/action- informed and guiding is comprehensible in terms of the roadmap that he wishes to pursue. As Hart had remained 'silent on the question of what makes it rational or

³⁶ Marmor, *supra* note 9, chs 1, 2, and 6.

³⁷ A. MARMOR, *Philosophy of Law*, Princeton, 2011, at 1. Emphases added.

³⁸ Marmor, *supra* note 9, p. 13.

³⁹ *Ibid.* The same point was made by Varro, whose account is not coincidentally used by Agamben in his inquiry into the non-juridical essence of regularities 'which [are] present in ordinary usage'. See Giorgio Agamben, *The Highest Poverty. Monastic Rules and Form-of-Life*, Adam Kotzo trans., Stanford, 2013 [2011], p. 66. See also Agamben's discussion of 'the Franciscans' arguments against John XXII', aimed at proving that 'drinking and eating [are] paradigms of purely factual human practice lacking any juridical implication', *ibid.* 126, and 129–31.

⁴⁰ Andrei Marmor, 'An Institutional Conception of Authority', *USC Legal Studies Research Paper No. 11-10* 11. Emphasis added.

⁴¹ *Ibid.* (emphasis added).

intelligible for people to regard the relevant social norms as binding or obligatory’,⁴² Marmor’s intention is in fact to fill this void by stressing the ‘need [for] a theory of social convention to articulate the requisite foundations’.⁴³ However, what is of relevance for us is that Marmor’s conception inevitably leads to a form of ‘non-normative’⁴⁴ LP that is merely descriptive and amoral in its essence.⁴⁵ This is simply inevitable: neither the behavioural mechanisation of human conduct and relations, nor the legal institutionalisation of the (authoritarian) processes that regulate them, is compatible with moral claims, the signification of which depends on our self-defining decisive thrownness into a ‘(form-of-)ethics’.⁴⁶

⁴² Marmor, *supra* note 37, p. 57.

⁴³ *Ibid.*, 60. Marmor’s argument in favour of *constitutive* conventions, as opposed to *coordination* conventions, ought to be appreciated along this line of reasoning. See also *supra* note 24.

⁴⁴ Marmor, *supra* note 37, pp. 109–15.

⁴⁵ A. MARMOR ‘Legal Positivism: Still Descriptive and Morally Neutral’, *USC Legal Studies Research Paper No. 05–16*. Marmor’s is a declared attempt to defend Hartian LP. It would prove worthwhile to compare it to the view Leslie Green has set out in ‘Positivism and the Inseparability of Law and Morals’ (2008) 83 *New York Univ. LR* 1035, as Marmor’s account is not discussed in it. See also Michael E Wilkinson, ‘Is Law Morally Risky? Alienation, Acceptance, and Hart’s Concept of Law’ (2010) 30(3) *Oxford Journal of Legal Studies* 441.

⁴⁶ The necessity to speak of an ethics whose substance is inextricably united with its own form emerges when we compare Agamben’s notion of ethics with Marmor’s inquiry into ethical positivism. According to Agamben,

[t]he fact that must constitute the point of departure for any discourse on ethics is that there is no essence, no historical or spiritual vocation, no biological destiny, that humans must enact. This is the only reason why something like an ethics can exist, because it is clear that if humans were or had to be this or that substance, this or that destiny, no ethical experience would be possible—there would be only tasks to be done.

G. AGAMBEN, *The Coming Community*, Micheal Hardt trans. Minneapolis, 2013 [1990], p. 42. See also *ibid.*, *Language and Death: The Place of Negativity*, Karen E Pinkus and Michael Hardt trans., Minneapolis, 1991[1982], p. 108. This notion of ethics overlaps with the role that Agamben assigns to pure *mannerism* in the community he urges us to form. G. AGAMBEN, *The Use of Bodies*, Adam Kotso trans. Stanford, [2014] 2016, pp. 207–13. See also below note 109.

Clearly Agamben re-proposes Heidegger’s vision, according to which when ethics becomes conceptual, it ceases to be ethics and turns into *ontology*. See Heidegger, ‘Letter on Humanism’, *supra* note 13, p. 258. If a *merely existentialist* ethics is the *only* ethics possible, both the second component of Tom Campbell’s notion of

I will come back to this in Section III when inquiring into Berteau's non-positivist moralisation of law's normative claim. For now, what should be noted is that all legal rationalists use the terms 'action' and 'behaviour' loosely. Joseph Raz, for instance, famously contended 'the law claims that the existence of legal rules is a reason for conforming *behaviour*'.⁴⁷ Yet a little later, when asking whether this meant that 'the law requires *action* against reason',⁴⁸ he answered 'No, it merely means that the law holds itself, i.e. the existence of the relevant legal rule, to be a reason which tips the balance and provides a sufficient *reason* for the required *act*'.⁴⁹ Similarly, Coleman is of the opinion that

[a]bove all else, law is a regulative institution that governs or purports to govern our *behavior* by telling us what we are prohibited from doing and what we are permitted to do; what we can require of others and what others can demand of us. Law purports not only to govern aspects of our conduct, but to do so in a distinctive fashion.⁵⁰

Yet Coleman tells us that 'one of the most important distinctions' in his book is 'the distinction (for each agent A) between (1) something's being *a reason for A to act*; and (2) something's being *a reason on which A acts*'. Once we acknowledge this antithesis, it becomes easier to understand that 'the distinctive feature of law's governance ... is that it purports to govern by creating *reasons for action*'.⁵¹

ethical positivism on the duty (or, we may say, *task*) of judges and the analysis that Marmor offers of it ought to be wholly reconsidered. See Marmor, *supra* note 37, pp. 113–15.

⁴⁷ J. RAZ, *The Authority of Law: Essays on Law and Morality*, Oxford 1979, p. 30. Emphasis added.

⁴⁸ Ibid.

⁴⁹ Ibid. Emphases added.

⁵⁰ J. L. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory*, Oxford, 2010 [2001], p. 70.

⁵¹ Ibid, p. 71. See also *ibid*, 'Law' (2003) 9(1) *Legal Theory* 14, 41; *ibid*, 'Truth and Objectivity in Law' (1995) 1(1) *Legal Theory* 33, where Coleman contends that '[legal sentences] endorse or prescribe actions', at 34. Finally, it should be noted that Coleman has more recently abandoned the term 'action', and argued that the '[l]aw claims to create reasons for *acting*'. For our scope, it would prove worthwhile to analyse this last account through the lens of Hamlet's distinction between 'action' and 'acting' and the role that, according to Carl Schmitt, this dichotomy played in the formation of modernity. See Jules L Coleman, 'The Architecture of Jurisprudence' (2011) 121(1) *Yale Law Journal* 2, 78, emphasis added; Carl Schmitt, *Hamlet or Hecuba: The Intrusion of the Time into the Play*, David Pan and Jennifer R Rust trans., Candor, 2009 [1956].

Attention should also be paid to the works of Scott J Shapiro, and in particular, to his reason-oriented theory of plans. In trying to overcome the limits of David Lewis's work on coordination conventions,⁵² and from Michael E Bratman's psychological account of intention(s) and action(s),⁵³ Shapiro's aim was to explain how and why 'the law organizes individual and collective behaviour so that members of a community can bring about moral goods that could not have been achieved, or achieved as well, otherwise'.⁵⁴ The law does so, Shapiro explains, because 'legal activity is a form of social planning' and 'planning is an excellent, often indispensable, method for guiding, coordinating, and monitoring *behaviour* in social settings'.⁵⁵ Yet a few pages before, Shapiro had contended that plans are norms because 'they are guides for conduct, insofar as their function is to pick out courses of *action* that are required, permitted, or authorised under certain circumstances'.⁵⁶ Along the same line of reasoning, Shapiro then distinguishes between plans that regulate actions (he calls them 'authorizations, instructions, stipulations, and factorizations') and plans that regulate planning (such as a 'bartender directive' or 'smoking permissions').⁵⁷

As a result, the anthropological and philosophical antithesis between action and behaviour is nullified by Shapiro's study, as emerges when action is at the same time the (unpredictable, boundless) raising of an arm and something that can be planned beforehand.⁵⁸ So we read:

[a] plan is applied prospectively when it is used to determine which actions are required, permitted, or authorized in the circumstances; a

⁵² S. J. SHAPIRO, *Legality*, Cambridge, 2011, p. 107.

⁵³ Ibid, p. 199.

⁵⁴ Ibid, p. 155.

⁵⁵ Ibid, p. 155 and p. 154 respectively. Emphasis added. Hence the law has a constitutive *moral* aim. Ibid, p. 212.

⁵⁶ Ibid, p. 127. Emphasis added. See also *ibid*, p. 152.

⁵⁷ Ibid, pp. 147–48.

⁵⁸ Shapiro, *supra* note 52, p. 123 and p. 125. See also *ibid*, p. 130. Other scholarship by Shapiro could be quoted for our scope. This would include *ibid* 'The Rationality of Rule-Guided Behavior: A Statement of the Problem' (2005) 42 *San Diego Law Review* 55; *ibid* 'Law, Plans, and Practical Reason' (2008) 8(4) *Legal Theory* 387; *ibid* 'Law, Morality and the Guidance of Conduct' (2000) 6(2) *Legal Theory* 127; *ibid* 'How Rules Affect Practical Reasoning' in B. VERBEEK (ed.), *Reasons and Intentions*, Aldershot, 2008, 133–54. See also S.J. SHAPIRO and E. MCCLENNEN, 'Rule-Guided Behaviour' in P. NEWMAN (ed.), *The New Palgrave Dictionary of Economics and the Law*, New York, 1998.

plan is applied retrospectively when it is employed to assess whether an action conformed, or failed to conform, to the plan in question.⁵⁹

Behaviour has now disappeared or, we may say, is still there with the resemblances of calculative (or speculative) action.⁶⁰ Even the most sound critiques of Shapiro's conception fail to notice this.⁶¹ Importantly, when reviewing Shapiro's monograph, William A. Edmundson pointed out that the 'beauty of plans' lies precisely in their capacity to 'constrai[n] how the planner thinks and acts'.⁶² This is what makes 'Planning Theory ... important, novel, and illuminating' and why '[t]he Planning Theory of legality is original and illuminating'.⁶³ It cannot go unnoticed that Edmundson paraphrases Kelsen when arguing so. Bearing in mind Agamben's aforementioned archaeological account on the use that Kelsen had made of the Kantian ontology of operativity, we may say that Kant would certainly agree with Edmundson's praise of self-annihilating planning. In this respect, if Edmundson is right in saying that legal theory is nothing but an exercise in political philosophy and that legal theorists ought to bear the responsibility to which this leads,⁶⁴ we should perhaps admit that with both Shapiro's and Edmundson's words the administrative paradigm of the liberal *technē oikonomikē*⁶⁵ has been provided with a normative validation and thus brought to completion: that is, our post-historical and post-political inhuman condition has been 'normalised' through the ultimate endorsement of the Stoic view that nothing is without a cause, and thus, that only 'appropriate' actions are 'virtuous' actions (to be discussed below). Cicero, who aimed to push farther the Stoic ethical doctrine, called this structural worldview *humanitas* and translated the term 'appropriate action' as 'duty' or *officium*—a notion around

⁵⁹ Shapiro, *supra* note 52, p. 126.

⁶⁰ Paraphrasing Agamben, we may say that Shapiro's liberalism normalises the politico-theological 'strategy that leads to conceiving human action as an *officium*'. See Agamben, *supra* note 28, 91. In this sense, to illustrate why action is never programmed, Shapiro's account should be compared with Cassirer's discussion of Henry Head's immediate and mediate action. Action is never programmed, not even when it is 'anticipated in thought' via a 'symbolic element' through which the 'idea of a definite goal is formed'. See E. CASSIRER, *The Philosophy of Symbolic Forms*, Vol. III, Ralph Manheim trans., New Haven, 1929 [1957], p. 214.

⁶¹ E. SHERWIN, 'Legality and Rationality: A Comment on Shapiro's Legality' (2013) 19(4) *Legal Theory* 403. See also A. HATZISTAVROU, 'Instrumental Rules and Motivation' (2006) 12(4) *Legal Theory* 315.

⁶² W.A. EDMUNDSON, 'Shmegality' (2011) 2(1) *Jurisprudence* 273, 274.

⁶³ *Ibid* and at 290 respectively.

⁶⁴ 'Why Legal Theory is Political Philosophy' (2013) 19(4) *Legal Theory* 331.

⁶⁵ 'This *logic*', Edmundson notes, 'achieves an *economy* that spontaneity cannot'. See Edmundson, *supra* note 62, p. 274. Emphases added.

which Agamben developed his critique of the ontology of modernity. It is therefore not a coincidence that, two millennia later, Heidegger, in his fight against metaphysics, logic, and ontology, unfolded this notion and placed it at the centre of humankind's animalisation as prompted by the behaviouralisation of its existence.

And indeed, in *Legality* we read that:

[i]n a shared activity, then, the actions of the participants must be coordinated with one another in order to benefit from the pooling of talent. The utility of any course of action cannot be evaluated in isolation but only as part of a total vector of concerted effort. Rational deliberation in a shared activity is, therefore, inherently strategic: what one person ought to do depends on what others will do.⁶⁶

Similarly, Edmundson writes that '[p]lanning's advantages are compounded where not individual but joint activity is contemplated'.⁶⁷ It seems, then, that the nature (and 'beauty') of our '*act-ivities*' depends on the usefulness of our tactical ability to organise them prior to their taking place. In this way, planning ceases to be a mere regulating principle, and becomes a *posited* norm in metaphysical and ontological terms. Yet the flaws of this view emerge when we bear in mind that Hayek—who Shapiro quotes to support his argumentative 'plan' without paying enough attention to his soft-decisionism⁶⁸—defined this illusion as the fallacy of constructivist rationalism,⁶⁹ and that Heidegger contended the following in the 'Letter on Humanism':

We view action only as causing an effect. The actuality of the effect is valued according to its *utility*. But the essence of action is

⁶⁶ Shapiro, *supra* note 52, p. 131. It is worth noting that Hannah Arendt's reflections on what constitutes action, as well as what distinguishes it from activity and behaviour, do not figure in Shapiro's account. See Arendt, 'Some Questions of Moral Philosophy', *supra* note 28.

⁶⁷ Edmundson, *supra* note 62, p. 274.

⁶⁸ Author

⁶⁹ Author

accomplishment. To accomplish means to unfold something into the fullness of its essence, to lead it forth into this fullness—*producere*.⁷⁰

The fact that these words on the inappropriateness of combining action with convenience were written by a philosopher whose aim was to fight the artifice brought about by the metaphysical tradition of subjectivity should make us reflect. In this sense, Shapiro's insistence on behavioural, planned joint activity may shed new light on why the crisis of decision-making processes that the West is currently experiencing is, above all, the existentialist crisis of what makes us human. What matters, then, is not (or not only) that (the idea of) justice does not appear in Shapiro's account,⁷¹ but that his planning theory—and, specifically, his belief that 'human beings are planning creatures'⁷²—is perfectly in line with universalised liberalism and its notions of 'civilised economy' and 'good economic governance'.⁷³

⁷⁰ Heidegger, 'Letter on Humanism', supra note 13, p. 217. First emphasis added. See also *ibid*, *The Fundamental Concepts of Metaphysics: Word, Finitude, Solitude* (William McNeill and Nicholas Walker trans., Indianapolis, 1995 [1983], p. 243: '[d]riven activity is a behaving'.

⁷¹ Sean Coyle, 'Legality and the Liberal Order' (2013) 76(2) *Modern Law Review* 401. In criticising Shapiro's functional account, Coyle contends that 'human beings are rational enough to understand that their very reason is everywhere led astray by their "interests"'. After having quoted Hobbes to support his claim, Coyle goes on and specifies that '[m]en stand in need of a common rule or power: the rule of law, not of their interests', *ibid*, p. 413 and p. 414 respectively. Hannah Arendt, who spotted in Hobbes' totalising plan the spark of the libero-imperialist bourgeois' intrusion into the domain of the political, would not agree with this reconstruction.

⁷² Shapiro, supra note 52, p. 156.

⁷³ Both terms relate to the belief that governments should educate consumers, as well as build or reform institutions and regulate economic activities, according to rational global standards determined by outsiders. See Author

In this respect, the link between the homogenisation prompted by liberal thought and Shapiro's scholarship is represented by three of the four 'misrepresentations of the spirit' described by Heidegger. I refer to the 'reinterpretation of spirit as *intelligence*', as a 'tool in the service of something else', and as something that 'can be *consciously* cultivated and planned'. See Martin Heidegger, *Introduction to Metaphysics*, supra note 13, 51–52. To be compared to the attempt to explain the functioning of political and social environments through the so-called behavioural logic of action. See J. G. MARCH, J. OLSEN, *Rediscovering Institutions: The Organizational Basis of Politics* (1989).

The notion of a 'Global Rule of Law' which transplants at the global level the understanding of the rule of law as a 'principle of governance', rather than government, should be inquired from this perspective. See Peter Rijkema, 'The Concept of a Global Rule of Law' (2013) 4(2) *Transnational Legal Theory* 167.

If we live in an age in which ‘popular sovereignty [is] an expression drained of all meaning’,⁷⁴ it is also because the ‘beauty’ of planned rational and mechanical causations is misleadingly imposed on given forms of polity from the outside (if planning has the virtues Shapiro describes, why should we not *make* everybody see how beneficial it is?). It is therefore not a coincidence that in the current process of de-juridification and de-politicisation, self-asserting forms of cultural signification are nullified by the replacement of value-informed *legal norms* (government) with value-free *social rules* (governance). The fact that we all ‘(non-)live’ in a sort of contemplative ‘global Eden’ in which we do not have sense of our living experience because we neither come to birth nor die as ‘someone’⁷⁵ is nothing but the inevitable *outcome*.

3. The Normative Structuralisation of Contemplative Behaviour

3.1. The Fallen Condition of Language and Legal Positivism’s Structuralism

Some commentators might argue that the normative endorsement of the ‘action to behaviour’ shift is not an exclusive prerogative of the legal positivist tradition, as it is present in other philosophical threads as well, such as that of the natural law school.⁷⁶ The role that Lon L. Fuller assigned to ‘economic calculation’ in humans’ movement toward the ‘morality of aspiration’ is testament to the appropriateness of such a claim.⁷⁷ The same may be said of how Fuller, like his positivist counterparts, interchanges the terms ‘action’ and ‘behaviour’ throughout his masterpiece. This is so despite both his aim to differentiate the horizontal working logic of legal systems from the vertical one of managerial direction and his belief that law does more than subjecting human conduct to rules.⁷⁸

Yet to be successful and perform its regulative instances, the behaviouralisation of man’s conduct had to be inscribed within an *institutional* framework of authoritative reference and legitimation. This is what, put bluntly, LP’s reason-oriented structuralism has done. In particular, the logic which has been discussed in previous Section and through which legal

⁷⁴ G. AGAMBEN, ‘Introductory Note on the Concept of Democracy’, in *Democracy in What State?*, New York, 2012 [2009], pp. 1–5, at 4.

⁷⁵ Author

⁷⁶ I want to thank Michael Gordon, Julian Webb, Lael Weis and George Duke for stressing this point.

⁷⁷ Leon L. Fuller, *The Morality of Law*, New Haven, 1964, 44–46.

⁷⁸ Ibid, p. 121, p. 162, p. 205, and p. 146 respectively.

positivists provide action with a source to make sense of its operativity (i.e., reasons for action), is the same logic that has served them to create the transcendental apparatus of institutional recognition through which the operativity of legal norms is assessed (i.e., a legal norm is valid because of its source, not its merit).

In the following pages, this dialectical process will be described by addressing Heidegger's notion of ontology and theology,⁷⁹ and delving into Agamben's philosophy of language.⁸⁰ The latter will be used to explore the essence of LP's institutional 'utterances'—and, thus, its politics of writing and speech, and forms of rhetorical elaboration—in light of both the fallen condition of human language and redemption of contemplative Adamic language. Finally, careful attention will also be paid to Ernst Cassirer's fundamental studies on language as one of the primordial symbolic forms with which humans mediate reality and synthesise it.

Adam and Eve's Fall from Eden was indeed caused by their desire for *knowledge* and *communicability*.⁸¹ With the Fall, self-defining, unpredictable action took the place of rational, contemplative behaviour, and 'power' (*potestas, conservatio, executio, dynamis, gubernatio*, acting, praxis, legality, angels) emerged out of 'authority' (*auctoritas, creatio, ordinatio, ousia, gloria*, being, substance, legitimacy, God).⁸² Building on Benjamin, Agamben⁸³ contends that the formation of this dualism shares important elements with the Stoic philosophy of language, according to which the pure and unreachable 'level of names' is different from the human and fallible 'level of discourse.' A similar claim was made in 1946 by Cassirer, according to whom Stoic philosophy underpins the (politico-theological)

⁷⁹ Heidegger, *Identity and Difference*, supra note 13, p. 59.

⁸⁰ Agamben, supra note 46; ibid *Means Without End. Notes on Politics* (Vincenzo Binetti and Cesare Casarino trans., Minneapolis, 2000 [1996]; ibid supra note 2; ibid, *The Kingdom and the Glory: For a Theological Genealogy of Economy and Government* (Lorenzo Chiesa and Matteo Mandarinini trans, Stanford, 2011 [2007]; ibid *The Sacrament of Language: An Archaeology of the Oath*, Adam Kotso trans., Stanford, 2011 [2008]; ibid 'Introductory Note', supra note 74.

⁸¹ Agamben, supra note 46; E. PAGELS, *Adam, Eve, and the Serpent: Sex and Politics in Early Christianity*, New York, 1999 [1988]; Gary A. ANDERSON, *The Genesis of Perfection: Adam and Eve in Jewish and Christian Imagination*, Louisville, 2001; Kahn, *Out of Eden*, supra note 17; ibid *Putting Liberalism in Its Place*, supra note 17, pp. 184–97. See also W. BENJAMIN, 'One-Way Street', in *Selected Writings*, Vol I, Marcus Bullock and Michael W. Jennings eds., Edmund Jephcott trans., Cambridge, MA, [1980] 1996, p. 482.

⁸² Agamben, *The Kingdom and the Glory*, supra note 80, p. 141, also speaks of 'transcendence/immanence, general providence/special providence (or fate), first causes/second causes, eternity/temporality, intellectual knowledge/praxis'.

⁸³ G. AGAMBEN, 'Language and History', in *Potentialities*, supra note 2, pp. 48–61, at 49.

myth of the modern state.⁸⁴ However, Agamben did not consider that even the Stoics' conception has a hidden forerunner which, with its focus on a *primordial substantial cause* or *first principle*, gave rise to the Western scientific tradition and influenced not only Stoic reasoning, but also Plato's universalist theory of Ideas, and thus, Christianity and the whole Western politico-theological, liberal, and positivist thought as such. I refer to Anaximander's (logical) cosmology, which Cornford not coincidentally defined as a 'the most *reasonable* theory of the origin and structure of the world' of that time and whose canon is 'a power which ordains both what *must* be and *ought* to be'.⁸⁵

For our purposes, this is important for two reasons. The first is because, by isolating and displacing authority from view,⁸⁶ the Western politico-theological tradition has nullified the *political* source (and essence) of power and rendered its exercise a mere *administrative* task. This is how *government* has become *governance*. The second reason is because, in terms of *juris genesis*,⁸⁷ LP's ground-giving, systematic order of institutional reference has reproduced and validated this schism. For politics to assume, in Agamben's words, 'the form of an *oikonomia*, that is, of a governance of *empty speech* over bare life,'⁸⁸ LP's metaphysical and ontological rationalism had to enter the scene and provide a normative and institutional validation for liberalism's agenda.

⁸⁴ E. CASSIRER, *The Myth of the State*, New Haven, 1974 [1946], pp. 163–75. See also Robert W. Sharples, 'Philosophy for Life', in G.R. BUGH (ed.), *The Cambridge Companion to the Hellenistic World*, Cambridge, [2006] 2011, pp. 223–40, at 233, according to whom the Stoics' belief that '[n]othing happens without a cause . . . is a theological assertion of the power of divine providence'. Hence, to the Stoics, '[h]uman actions are predetermined as everything else', *ibid.*

⁸⁵ F.M. CORNFORD, *From Religion to Philosophy. A Study in the Origins of Western Speculation*, Dover, 2004 [1912], p. 11. First emphasis added. In Cornford's words, Anaximander's cosmology is composed of 'three main factors or representations: (1) a primary stuff (*physis*); (2) an order, disposition, or structure into which this stuff is distributed; (3) the process by which this order arose', *ibid.*, p. 9. See also *ibid.*, pp. 144–47. Finally, see Cassirer, *supra* note 84, p. 54.

⁸⁶ Hannah Arendt, 'What is Authority?', in *Between Past and Future*, London, 2006 [1961], pp. 91–141; Agamben, *The Kingdom and the Glory*, *supra* note 80; *ibid.* 'Introductory Note', *supra* note 74. See also Ernst H. Kantorowicz, *The King's Two Bodies. A Study in Mediaeval Political Theology*, Princeton, 1981 [1957].

⁸⁷ My use of the genealogical method is different from that of Sylvie Delacroix in that mine looks for the metaphysical origin of the process it inquiries into. See Sylvie Delacroix, *Legal Norms and Normativity: An Essay in Genealogy*, London, 2006. Critically, see Maksymilian Del Mar, 'Legal Norms and Normativity' (2007) 27(2) *Oxford Journal of Legal Studies* 355.

⁸⁸ Agamben, *The Sacrament of Language*, *supra* note 80, p. 72. Second and third emphases added.

3.2. The Structural Artifice

The anthropological illusion at the centre of this paper is truly ontological in its signifying and pervasive structure. That is, it has used ontology's logic to promote itself. With this I refer not only to ontology as the science that investigates what 'exists',⁸⁹ but also to Heidegger's definition of ontology as that branch of concept-oriented, metaphysical thinking that looks for the universal and common ground of beings.⁹⁰ Thus, from an ontological point of view, the substitution of action with behaviour would have not been possible without the back-up of a legitimatising apparatus of reference. The theological component of the Western tradition that LP has inherited has filled this post-political role. Not coincidentally, Heidegger was of the opinion that ontology and theology are united in their metaphysical logic. In his words,

Ontology ... and theology ... account for Being as the ground of beings. They account to the Λόγος, and are in an essential sense in accord with the Λόγος-, that is they are the logic of the Λόγος.⁹¹

Building on these insights, Agamben has spent a great amount of effort to demonstrate that, since the Greek *polis*, Western politics has been characterised by the two paradigms of 'politico-juridical' and 'economic-governmental' rationality. In doing so, Agamben has moved on from his teacher and proved that by transposing the Pauline concept of the

⁸⁹ On legal ontology, see Author

⁹⁰ Heidegger, 'Identity and Difference', supra note 13, p. 58. See also *ibid* *The Metaphysical Foundations of Logic* (Michael Heim trans., Indiana University Press 1984 [1978]); *ibid* 'What is Metaphysics?', in *Basic Writings*, supra note 13, pp. 93–110, at 106. On why metaphysics 'thinks of man on the basis of *animalitas*', see *ibid* 'Letter on Humanism', supra note 13, pp. 226–27. See also *ibid* 'The Thing', supra note 13, p. 176; *ibid* 'The End of Philosophy and the Task of Thinking', in *Basic Writings*, supra note 13, 432; *ibid* *The Fundamental Concepts of Metaphysics*, supra note 70; *ibid* *Parmenides*, supra note 13, pp. 49–54. See also A. KOJÉVE, *The Notion of Authority (A Brief Presentation)*, François Terré ed., Hager Weslati trans., New York, 2014 [2004], p. 57.

⁹¹ Heidegger, *Identity and Difference*, supra note 13, p. 59. See also *ibid* *Introduction to Metaphysics*, supra note 13, p. 45 and pp. 132–34; *ibid* *Being and Time* (John Macquarrie and Edward Robinson trans., New York, 2008 [1927], pp. 55–58. See also J. DERRIDA, *Heidegger, la question de l'Être et l'Histoire, Cours de l'ENS-Ulm 1964-1965*, Linné, 2013, p. 23.

Heidegger's insights may also assist us in understanding why Hannah Arendt was of the idea that, by being based on the principle of non-contradiction, Kant's 'secular morality' is logical. See Arendt, 'Some Questions of Moral Philosophy', supra note 28, p. 123.

‘economy of the mystery’ into the ‘mystery of the economy’, the Church has made the (theological) ‘economic-managerial’ paradigm the key component of Western civilisation. More precisely, drawing from Kafka and Benjamin while describing how our inhuman condition is a product of the West’s ‘double governmental machine’, Agamben condemned the *angels* (and, thus, the regulatory apparatus rooted in the Church’s paradigm) for having failed their mission and argued that only Paul’s original Messiah can save humankind. Agamben’s aim is to demonstrate that the modern state has ‘inherited’ the same logic of the Trinitarian paradigm of the *oikonomia* as ‘activity of management and government of people and things’.⁹² While it was with Rousseau that the ‘machine of providence [was] transferred from the theological to the political sphere’,⁹³ it was only with liberalism that this phenomenon was fully embraced and pushed farther.⁹⁴ Thus, taking the side of Peterson *contra* Schmitt to delve into the subjectless essence of this strategy,⁹⁵ of which the *kénōsis* is

⁹² Agamben, *The Kingdom and the Glory*, supra note 80, p. 278. See also *ibid.*, p. 142 and pp. 261–87; *ibid.* *The Time that Remains. A Comment to the Letter to the Romans*, Patricia Daily trans., Stanford, 2005 [2000]; *ibid.* supra note 16, p. 81; *ibid.* ‘Introductory Note’, supra note 74, p. 4; *ibid.* *Opus Dei*, supra note 28. See also J. DERRIDA, *Rogues. Two Essays on Reason*, Pascale-Anne Brault and Michael Naas trans. Stanford, 2005 [2003], p. 28.

⁹³ Agamben, *The Kingdom and the Glory*, supra note 80, p. 272.

⁹⁴ *Ibid.*, pp. 284–85. See also *ibid.* *Stasis. Civil war as a Political Paradigm*, Nicholas Heron trans., Stanford, 2015 [2015], pp. 22–24.

⁹⁵ ‘[T]he liturgical praxis of the Church [is defined by] the independence of the objective effectiveness and validity of the sacrament from the subject who concretely administers it’. That is, ‘the agent acts only insofar as it is an effect in its turn’ so that ‘action [is] reduced to [an] instrumental cause’. See Agamben, *Opus Dei*, supra note 28, p. 21 and p. 64 respectively. See also *ibid.*, supra note 39.

Socrates, Plato taught us, drank the cup of hemlock calmly because he believed in the immortality of the soul. The influence of this transcendental view on Plato’s belief that, in Heidegger’s words, ‘what endures . . . is what remains permanently’, as well as on the Aristotelian doctrine of the ‘eternity of the world’, is evident: to preserve the ‘corpo-rational’ perpetuity of the ‘body’, the singular units which compose it have to be replaceable. Or, we may say, ‘being’ has to be emptied in favour of (never ending) ‘becoming’ so that historical beings may be compatible with their ideal prototype. Agamben showed that this philosophical conception was first inherited by Christianity and then absorbed by liberal thought for regulative purposes. In particular, while the former transformed it into a biopolitical and regulative dogma, the latter extended it to society at large. And indeed, Agamben notes, the Greek term *paroikousa* ‘designates the manner in which foreigners and those in exile dwell’. Furthermore, *paroikein* ‘to sojourn as a foreigner . . . is the word that designates how a Christian is to live in the world’. Hence, the reason why in liberal thought identities are innocent and humans are interchangeable contracting units is that, in the *corpus Christi* of the Church, humans are but *foreigners* deprived of what defines them.

the political paradigm par excellence,⁹⁶ Agamben contends that modernity has done nothing other than to show that the subjects of biopolitics are treated as ‘animals’ and no one can be held responsible for it.⁹⁷

Legal positivists, I believe, stand among Agamben’s angels. That is, as *militia legum*, they represent a zone of indistinction between the *militia coelestis* of the clergy and Baldus’s *militia doctoralis*. Paraphrasing the cabalist episode of the Shekinah—the isolation, made by the Rabbi Aher after having entered into Pardes, of the ‘word’ as ‘the last of the ten Sefirot or attributes of the divinity’⁹⁸—it may be said that, far from acting as a mere descriptive theory, LP has normalised both the separation of power from authority and the inclusion of the latter in it. From Bentham to Austin, passing through Hobbes, Kelsen, and Hart, to contemporary positivists such Marmor, Shapiro, Raz, Green, Kramer, and others, the working logic of LP’s performative dualistic apparatus of *primary* and *secondary* causes has *essentially* reproduced the politico-theological dichotomy between authority and power, by *existentially* turning action against itself so that it could be transformed into behaviour.

If, as Arendt noted, ‘authority has vanished from the modern world’,⁹⁹ it is because what modernity has witnessed is nothing but the experience of the folding up of action’s hyperbole prompted by the politico-theological and liberal self-emptying paradigm and further endorsed by LP’s dual characterisation. To say it differently, if we live in the post-historical and post-political age, it is because the substitution of action with behaviour has determined the absorption of authority by power. The effect of this operation—apolitical in its form, but

See M. HEIDEGGER, ‘On the Essence of Ground’, in *Pathmarks*, William McNeill ed., Cambridge, 1998 [1967], pp. 97–135; *ibid* ‘The Question Concerning Technology’, in *The Question Concerning Technology*, *supra* note 13, p. 30; *ibid* *Introduction to Metaphysics*, *supra* note 12, 102–230; *ibid*, *Parmenides*, *supra* note 13, p. 93; Kantorowicz, *supra* note 86, pp. 273–92; G. AGAMBEN, *The Church and the Kingdom*, Leland de la Durantaye trans., London, 2012 [2010], pp. 1–2.

⁹⁶ See Moltmann’s contention that ‘in Christian life . . . the question of identity comes to a head only in the context of non-identity, self-emptying for the sake of others and solidarity of others’, in *The Crucified God*, New York, 2001 [1974], p. 12. See also *ibid*, pp. 13–23.

⁹⁷ G. AGAMBEN, *Homo Sacer. Sovereignty and Bare Life* (Daniel-Heller Roazen trans., Stanford, 1998 [1995], 6.

⁹⁸ Agamben, *The Coming Community*, *supra* note 46, p. 81. See also *ibid* ‘Pardes: The Writing of Potentiality’, in *Potentialities*, *supra* note 2, pp. 205–19.

⁹⁹ Arendt, *supra* note 86, p. 91. See also *ibid* *On Revolution*, London, 2006 [1963], pp. 171–206.

political in its consequences—is manifesting itself in our neorealist global age in the terms described in the introductory part of this article.

Paraphrasing Cassirer, LP's structure ought to be judged the function it has had, and still has, in this dehumanising process.¹⁰⁰ In particular, the very act of positing the law and legitimising this authoritarian operation through reference to a real, concrete and yet sublime and unreachable meta-source of validation is what we should delve into if we are to uncover the true essence of LP's artifice. It is of little significance whether the necessary connection that informs the 'primary/secondary' causes antithesis assumes the form of a constituent sovereign as opposed to a constituted official (Hobbes and Austin), or a general will as opposed to particular wills (Rousseau), or a *Grundnorm* as opposed to an ordinary norm (Kelsen), or a social convention/rule of recognition as opposed to a rule of obligation (Hart and adherents). What matters is that while, according to classic story-telling narratives, legal positivists were looking for legitimacy and validity by promoting a legal understanding of societal relations that guarantees civil liberties, the transcendental apparatus of institutional recognition and validation that they used (i.e., the idea that all legal norms can be traced back to a source of reference) is truly metaphysical¹⁰¹ and has served to return us to the 'global Eden' by passivizing our existence.¹⁰²

¹⁰⁰ E. CASSIRER, *The Philosophy of Symbolic Forms*, Vol. I., Ralph Manheim trans., New Haven, 1955 [1923], p. 79.

¹⁰¹ I use the term 'metaphysical' in a Heideggerian fashion: '[t]he essential constitution of metaphysics is based on the unity of beings as such in the universal and that which is the highest'. See Heidegger, *Identity and Difference*, supra note 13, p. 61. See also *ibid.* p. 58 and p. 71.

Others, such as Tobin Spaak, have indirectly pointed at LP's metaphysical essence by focusing on its aim to offer an account of the *concept* of law. As such, LP is defined as a 'meta-theory of law'. See T. SPAAK, *A Critical Appraisal of Karl Olivecrona's Legal Philosophy*, Dordrecht, 2014, p. 245.

¹⁰² The language used by Hart in his practice theory offers an astounding example of this: the rules which legitimate the existence and enforcement of rules of conduct are *secondary*, that is, they are placed on an outer level of appearance, even though they exercise a *primary* function. It would be worthwhile to analyse Hart's conception through the lens of Heidegger's account on the 'usual concept of truth'. According to Heidegger, in the West, under the influence of the 'Christian theological belief', logical truth has always implied the preconceived correspondence between knowledge and matter. In his words,

[t]he theologically conceived order of creation is replaced by the capacity of all objects to be planned by means of a worldly reason ... which supplies the law for itself and thus also claims that its procedure is immediately intelligible.

The substitution of action with behaviour becomes in this sense even more understandable, as action is the manifestation of the sovereign decision that creates, as God did, something from nothingness.¹⁰³ Thus, neither metaphysics nor science, with their shared focus on the cause and ‘beingness’ of phenomena, may access the essence of action (*ex nihilo nihil fit*),¹⁰⁴ and law as understood by legal positivists, that is as ethereal, abstract, and general *scientia juris*, can never understand it fully. Consequently, the only form of conduct that may have a legitimising source, or a *causa materialis*, in ontological and normative terms is behaviour. This is why, as set out in the previous Section, legal positivists make of the *reasons for action* (practical reason) the canon of their arguments—as a way to make sense ontologically and normativistically of something that cannot, by anthropological and philosophical definition, be explained in rational terms.¹⁰⁵ The influence of Herbert A. Simon’s studies on the link between the rational essence of modernity and the use that the rational actor makes of the law to pursue his/her own interests when evaluating behavioural alternatives, or the role that Georg Henrik von Wright’s scholarship on the *logic of action* has played in recent scholarship on Hart’s internal acceptance of social rules, are clear testament to this.¹⁰⁶ Thus, the transformation of the ‘action to behaviour’ philosophical and anthropological shift into a normative conception would have not been possible without LP’s *structural objectification* of law’s character, and the fulfilment, through it, of the Western politico-theological managerial paradigm. Put differently, positivist thought has transformed the liberal illusion into a juridical artifice that has acted, through a double-featured structure of bio-power, as a macro ‘social sedative’ without which the consolidation of our post-historical and post-political

See M. HEIDEGGER, ‘On the Essence of Truth’, in *Basic Writings*, supra note 13, pp. 115–38, at 119. See also *ibid* *The Metaphysical Foundations of Logic*, supra note 90, p. 22, p. 23, p. 30, and pp. 123–28.

¹⁰³ Author

¹⁰⁴ A fundamental quote from Heidegger would suffice here: ‘Nothing remains in principle inaccessible to all science. Whoever truly wants to talk of Nothing must necessarily become unscientific’, in *Introduction to Metaphysics*, supra note 13, pp. 28–29. See also below note 154.

¹⁰⁵ Cf. the role assigned by Peter Stein to Aristotle’s notion of science in the development of Western legal thinking, in *Regulae Iuris. From Juristic Rules to Legal Maxims*, Edinburgh, 1966, pp. 33–36.

Even those who try to overcome the limits legal rationalists’ thought cannot avoid grounding action in a rational base. See C. ESSERT, ‘Legal Obligations and Reason’ (2013) 19(1) *Legal Theory* 63. For a sociological view, see A GIDDENS, *The Constitution of Society: Outline of the Theory of Structuration*, Cambridge, 1984.

¹⁰⁶ See H. A. SIMON, *Reason in Human Affairs*, Stanford, 1983; A. PERRY, ‘The Internal Aspect of Social Rules’ (2015) 35(2) *Oxford Journal of Legal Studies* 283, 284.

condition would have not occurred. If this is correct, David Dyzenhaus's insights into 'why legal positivism is authoritarian'¹⁰⁷ as well as his association of LP's philosophy with undesirable consequences in real-life politics can be evaluated from a different, and more comprehensive, standpoint.¹⁰⁸

To Agamben the situation is so compromised that we may only be saved by the formation of a Messianic community composed of 'singularities' without 'identities' which are freed from all presuppositions and merely united in their ethical mannerism, that is in 'belonging' and 'appearing' as 'being-*such*(-in-language)'.¹⁰⁹ To neutralise the current age's 'complete confusion' between 'juridification and commodification of human relations',¹¹⁰ Agamben argues, we must use our biopolitical animalisation for our own benefit by bringing it to its *unthinkable* limits. This is why Agamben writes that the fact that 'the planetary petty bourgeoisie is probably the form in which humanity is moving towards its own destruction ... represents an opportunity unheard of in the history of humanity that it must at all costs not let slip away'.¹¹¹ The paradigm that the Western politico-theological tradition has used to render us what we are—biopolitical *sacrifice*—can only be deactivated by our ethical *profanation* of the factual experience of language as language:

Only those who succeed in carrying [contemporary politics' *experimentum linguae*] to completion ... will be the first citizens of a community with neither presumptions nor a State, where the nullifying and determining power of what is common will be pacified
....¹¹²

¹⁰⁷ D. DYZENHAUS, 'Why Positivism is Authoritarian' (1992) 37(1) *Am. J. Jur.* 83.

¹⁰⁸ D. DYZENHAUS, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar*, Oxford, 1997; *ibid*, 'The Genealogy of Legal Positivism' (2004) 24(1) *Oxford Journal of Legal Studies* 39; *ibid*, 'Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security' (2003) 28 *Australian Journal of Legal Philosophy* 1; *ibid*, *The Constitution of Law in a Time of Emergency* (Cambridge University Press, 2006).

¹⁰⁹ Agamben, *The Coming Community*, *supra* note 46; *ibid*, *Language and Death*, *supra* note 46.

¹¹⁰ Agamben, *The Church and the Kingdom*, *supra* note 95, p. 108.

¹¹¹ Agamben, *The Coming Community*, *supra* note 46, p. 65.

¹¹² *Ibid*, 83. See also *ibid*, p. 50. Biopolitics' experiment ought to be compared with the role that Thomas' 'cognitive experiment' has had in our animalisation. See *ibid*, *The Open*, *supra* note 28, p. 22.

Importantly, in conceiving Pauline Messianism ‘as a corrective to the demonic hypertrophy of angelic and human *powers*’,¹¹³ Agamben contends that ‘the Messiah will only come when he is no longer necessary’, that is when the *katargēsis* will become operative. For this to happen, an absolute—that is, exceptional and sovereign—*act* of simultaneous ‘potentiality’ and ‘actuality’ (a *destituent potential*, as he defines it) is required. Agamben thus goes back to Plato and Aristotle and sets his political agenda apart from that of Heidegger.¹¹⁴ However, while Agamben’s reconstruction of the origins of the ‘capitalist religion’¹¹⁵ that underpins our ‘form-of-(non-)living’ is surely convincing, the urgent need to defeat the nihilism that characterises our inhuman condition requires a less utopic solution. In particular, any concrete measure against the neutralising and inegalitarian impact of the liberal Westernisation of living standards will require us, as lawyers, to uncover the disruptive force that lies beneath LP’s humanitarian façade.

For this to be done, our attention should also be directed toward all those accounts of law’s moral normativity that are said to be other than positivist but that, in fact, reproduce LP’s illusion as I have described it. I primarily refer to Stefano Bertea’s account of law’s normative claim.¹¹⁶ In his well-known and thought-provoking monograph, Bertea declares that his non-positivist¹¹⁷ vision of law’s normativity is pragmatically Kantian, ‘action-centred’, and yet non-metaphysical.¹¹⁸ The same understanding was put forward more recently in an essay whose intent was to demonstrate that ‘the normativity of practical reason ... ultimately lies in an agent’s responsiveness to reason’.¹¹⁹ In particular, Bertea’s aim is to

¹¹³ Agamben, *The Kingdom and the Glory*, supra note 80, p. 166. Emphasis added.

¹¹⁴ Agamben, *The Use of Bodies*, supra note 46, pp. 269–73; Agamben, supra note 97, 44–48 and 57–58; *ibid*, ‘The Messiah and the Sovereign: The Problem of Law in Walter Benjamin’, in *Potentialities*, supra note 2, pp. 160–74; *ibid*, *The Time that Remains*, supra note 92, pp. 95–112; *ibid*, *The Open*, supra note 28, p. 92; *ibid*, *The Coming Community*, supra note 46, pp. 34–40, 65, 83, 85, and 87; *ibid*, *Language and Death*, supra note 46. See also Heidegger, ‘Letter on Humanism’, supra note 13, p. 220 and p. 229. See also below note 155.

¹¹⁵ Agamben, supra note 16, p. 81.

¹¹⁶ S. BERTEA, *The Normative Claim of Law*, Oxford, 2009.

¹¹⁷ *Ibid*, 133.

¹¹⁸ *Ibid*, 189.

¹¹⁹ S. BERTEA, ‘Law and Obligation: Outlines of a Kantian Argument’, in George PAVLAKOS & Stefano BERTEA (eds.) *New Essays on the Normativity of Law*, Oxford, 2011, pp. 199–218, at 217.

oppose inclusive positivism¹²⁰ on three grounds. For our purposes, I will consider only the third component of Berteau's critique, namely that

to delimit the scope of the normative claim of law, to the effect that it is seen as a claim made only on those committed to a legal system, is at the origin of both a defective understanding of the legal enterprise and a mistaken picture of the relations obtaining between officials and citizens.¹²¹

This limited view, Berteau further maintains, falls short in explaining how (and why) a legal system works through law's normative claim. More precisely, in addressing Coleman's inclusive positivism and its notion that 'the normative concerns of the law are addressed exclusively to legal officials',¹²² Berteau argues that 'the law is capable of serving the objectives in the pursuit of which legal officials commit themselves to the legal system only if citizens at large treat the standards issued by the officials as reasons for action and so conform to them'.¹²³ Although Berteau's attempt to detach law from metaphysics is all the more essential in light of what I have set out thus far, his reference to the (practical) reasons for action¹²⁴ compromises the whole enterprise.

Furthermore, as Alexy has recently pointed out, an important limit in Berteau's theory is that combining action and shared morality does not provide decision with a 'systematically relevant place'.¹²⁵ Yet, in offering an account according to which 'metaphysics and decision ... are necessary constituents of an adequate conception of normativity',¹²⁶ Alexy's critique cannot help us uncover the real essence of Berteau's approach to law's normativity, as it reproduces its same structural premises, simply in a different form. Rather, it would be more fruitful to evaluate Berteau's reasoning through a neorealist lens with the use that Agamben has made of Peterson's 1935 scholarship when illustrating the managerial paradigm that

¹²⁰ Berteau, *supra* note 116, p. 68.

¹²¹ *Ibid.*

¹²² *Ibid.*, p. 94.

¹²³ *Ibid.*, p. 95.

¹²⁴ *Ibid.*, p. 90. See also *ibid.*, p. 171.

¹²⁵ R. ALEXY, 'Normativity, Metaphysics, and Decision', in *New Essays on the Normativity of Law*, *supra* note 119, pp. 219–29, at 226.

¹²⁶ *Ibid.*, 228.

underpins the Western tradition.¹²⁷ In doing so, it will become apparent that Berteau's *moral* desire to extend law's normative claim from the 'shared cooperative activity on which legal officials embark'¹²⁸ to ordinary citizens by grounding their actions in the instances prompted by practical reason¹²⁹ leads to the transposition into the legal dimension of humankind's 'participation in the angels'.¹³⁰ In other words, what we are standing in front of here is a neo-Kantian ontology of ethical behaviour that tends to a self-nullifying 'universal peace' whose rational canon—the categorical imperative, here presented in the form of 'human agency [that] rests on a purely practical anchorage'¹³¹—resembles the contemplatively *inactive*, norm-oriented celestial worship of the citizens-angels.¹³²

At this stage, it could be argued that what this paper claims is misleading, as its premise is flawed. Two points could be made. First, it could be suggested that normativity presupposes, among other things, both ontology and metaphysics. Secondly, it could be objected that the type of structuralism that this paper has targeted is not a prerogative of LP because, by definition, it features in all types of positivism. To the first objection I would respond by referring to what I shall contend in the conclusion of this paper, namely that normativity presupposes the exact opposite of what the Western metaphysical and ontological tradition has always shown us: authority's negativity. The second observation would, however, surely be correct. Cassirer demonstrated this well when inquiring into the anthropological essence of language as one of the primordial symbolic forms of myth.¹³³ I have discussed the relevance

¹²⁷ Agamben, *The Kingdom and the Glory*, supra note 80, pp. 144–66.

¹²⁸ Berteau, supra note 116, p. 95.

¹²⁹ See also S. BERTEAU, 'Law, Shared Activity, and Obligation' (2014) 24(2) *Can. J. L. Jur.* 357.

¹³⁰ Agamben, *The Kingdom and the Glory*, supra note 80, p. 147.

¹³¹ Berteau, supra note 116, p. 189.

¹³² See Augustine's call for a 'state of peace' founded in the 'harmonious fellowship in the enjoyment of God', in *City of God*, London, 2003, p. 878. More broadly, see J. MILBANK, *Theology and Social Theory: Beyond Secular Reason*, Hoboken, 1990. See also Agamben, *The Kingdom and the Glory*, supra note 80, p. 147:

[i]f the politicality and truth of the *ekklēsia* is defined by its participation in the angels, then men can also reach their full celestial citizenship only by imitation the angels and participating with them in the song of praise and glorification.

¹³³ Cassirer, supra note 60; *ibid*, *An Essay on Man* (Yale University Press, 1962 [1946]) 109–35; *ibid*, *Language and Myth* (Dover, 1953 [1925]); *ibid*, supra note 84, pp. 16–22.

of Cassirer's scholarship to law and legal reasoning elsewhere.¹³⁴ Suffice it to say that what distinguishes all forms of positivism (i.e., physical, mathematical, biological, historical, etc.) from their legal counterpart is the latter's *biopolitical regulative force*. This is why LP's illusory dual structure could not have been brought to completion without the inclusion of a component that could act as a universalist source of *inner coherence* from which all subsequent regulative claims could be derived: justice.

In fact, Cassirer's description of the movement from the linguistic positivistic schools of the nineteenth century—according to which 'phonetics and semantic required *separate* study according to different methods'¹³⁵—to modern structuralism's belief that '[t]he distinction between form and matter proves artificial and inadequate'¹³⁶ may assist us when addressing the 'occult' side of LP's political artifice. As happened with the transition in linguistic thought, the interconnected dualism of 'authority/power' was neutralised when, in isolating power from authority, legal positivists included the latter in the former, thus causing it to disappear. What Arendt had witnessed and reported in her reflections—the vanishing of authority from the world—took place precisely because LP's metaphysical dualism has normalised the absorption of authority by power. The aforementioned hidden secularisation of naked or bare life (*zoē*) and political or public existence (*bios*) ought to be inscribed within this phenomenon.

4. Conclusion

Not long ago, Raz famously asked whether 'there can be a theory of law'.¹³⁷ This question is relevant, as the point of departure for theory is experience.¹³⁸ Indeed, by being always preceded by practice, theory risks being confined to a secondary role. Raz answered his own question by pointing out that 'a theory of law is successful if it meets two criteria: first, it

¹³⁴ Author

¹³⁵ Cassirer, *An Essay on Man*, supra note 132, p. 125.

¹³⁶ Ibid.

¹³⁷ J. RAZ, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press, 2009) 17–46.

¹³⁸ G.W.F. Hegel, *Hegel's Logic: Being Part One of the Encyclopedia of the Philosophical Sciences*, sect. 12, William Wallace trans., Oxford, 1975 [1830].

consists of propositions about the law which are *necessarily* true, and, second, they *explain* what the law is'.¹³⁹

Bearing in mind what Cassirer had clarified on the 'perils' of language,¹⁴⁰ the answer to Raz's question that I would propose is far more straightforward: 'Yes, there can be a theory of law as long as we understand and respect words' performative *force*'. Words matter not only because the structure of language determines that of thought and culture,¹⁴¹ but because in their metaphysical and ontological *negativity* lies what Agamben has defined as the *Voice*¹⁴²—language itself. If Agamben is right when he contends that in our age 'humans are separated by what unites them [because] in the society of spectacle [the communicative essence of humans] ... is separated in an autonomous sphere',¹⁴³ it is because we no longer experience language for what it is. Instead of dwelling in it, we displace it by abusing our *voice*, thus draining it of its real essence.¹⁴⁴ Similarly, we no longer experience authority for what it is, as through the 'pathology of the legal word' that this paper has addressed, LP's rationalism has determined its separation from, and further absorption by, power.¹⁴⁵

So the question arises: How can (legal) language's suffering be cured? The appropriateness of the answer depends on our willingness and ability to provide a solution to it, which in turn depend on our understanding of the phenomenon described by this paper. Hence the first step would be internalising why we are returning to the metaphysical seed of the Western bio-

¹³⁹ Raz, *supra* note 137, p. 17.

¹⁴⁰ As Cassirer, *supra* note 84, p. 18, put it, '[t]o be sure, language is logical and rational, but on the other hand it is also a source of illusions and fallacies'.

¹⁴¹ See B. L. WHORF, *Language, Thought and Reality* (John B. Carroll, Stephen C. Levinson, & Penny Lee eds. Cambridge, MA, 2012 [1956]).

¹⁴² Agamben, *Language and Death*, *supra* note 46, p. 35.

¹⁴³ Agamben, *The Coming Community*, *supra* note 46, p. 82.

¹⁴⁴ Thus, Andrew Alpin's view that '[i]t is understandable that concepts, terms/labels, and categories should be regarded as interchangeable' ought to be carefully interrogated if we are to use legal theory's tools to defeat our animalisation. See A. ALPIN, 'Concepts, Terms, and Fields of Enquiry' (1998) 4(2) *Legal Theory* 187, 188.

¹⁴⁵ If the Enlightenment is the age against all distinctions as Jan Assmann taught us, it comes as no surprise that both phenomena find their common denominator in the empiricism of the father of the Leviathan. In fact, Hobbes not only believed that all the truth resides in the word, but as MacPherson and Arendt set out, also paved the way for the intrusion of the libero-imperialist bourgeois into the domain of the political. See '*Veritas in dicto, not in re consist*', in De Corpore, Pt. 1, Ch. 3, sec 7; C.B. MacPherson, *The Political Theory of Possessive Individualism*, Oxford 1962, p. 3, p. 22, p. 29, and p. 46; Hannah Arendt, *The Origins of Totalitarianism*, New York, 1973 [1951], p. 139.

political and theological tradition—that is, to *λόγος* as contemplative logic that exerts its performative claims through the post-political, self-annihilating strategy prompted by universalised liberalism. It is usually maintained that ‘[r]eason is not man’s primitive endowment, but his *achievement*’¹⁴⁶—a view that the positivist Comte would agree with as, in 1844, he described how the modern mind brought reason to its most mature phase of development. If anything, this demonstrates that the de-politicisation and de-juridification of the world we are witnessing is but the last stage of circular movement from humans’ behavioural contemplation of God in Eden, to *active* appropriation of language as primordial and symbolic form through which the human spirit experiences conscious freedom of subjectivity in Cassirerian terms, and return again to (global) Eden.

If this is correct (or at least plausible), our animalisation cannot be defeated through the communalisation of the Trinitarian paradigm of ‘ontological peace, which loves all individuals in the community’.¹⁴⁷ Those who propose to pursue such a roadmap with the aim to deactivate the violent and inhuman ‘secular nature’ of liberalism and positivism are, in fact, leading the Western model of behavioural self-annihilation to completion. Rather, we should focus on Heidegger’s intention to reach a thinking that thinks¹⁴⁸ by ‘reflect[ing] on language *qua* language’,¹⁴⁹ that, is by ‘free[ing] ourselves from the technical interpretation of thinking’¹⁵⁰ promoted by the Western ‘onto-theo-logical’¹⁵¹ metaphysical tradition. Indeed,

¹⁴⁶ S. K. LANGER, ‘Introduction’, in Cassirer, *Language and Myth*, supra note 133, p. ix.

¹⁴⁷ A. DEAGON, ‘On the Symbiosis of Law and Truth in Christian Theology: Reconciling Universal and Particular through the Pauline Law of Love’ (2014) 23(4) *Griffith Law Review* 589, 611.

¹⁴⁸ Heidegger, ‘Letter on Humanism’, supra note 12, 217. Heidegger thinks of a thinking that is neither practical nor theoretical and whose *poiēsis* suppresses the political as we know it. In this way, thinking places itself ‘outside of the distinction of rational and irrational’. See *ibid*, 259; *ibid*, ‘The End of Philosophy and the Task of Thinking’, supra note 90, 431–49, at 449.

¹⁴⁹ Heidegger, ‘The Way to Language’, supra note 13, p. 119. See also *ibid*, ‘The Nature of Language’, supra note 13, p. 59.

¹⁵⁰ Heidegger, ‘Letter on Humanism’, supra note 13, p. 218. To Heidegger, ‘language is not the utterance of an organism [but] the clearing-concealing advent of Being itself’. The thought-of-Being, that is the principle of identity that determines the ‘Sameness of thinking and Being as the belonging together of the two’ may only be accomplished in poetry as authentic language. More precisely, the clearing ‘ek-sistence’ of Being may only occur in the ‘neighborhood of poetry and thinking’. Not coincidentally, Heraclitus and Parmenides are the poetic thinkers. See Heidegger, *Letter on Humanism*, supra note 13, p. 230; *ibid*, *Identity and Difference*, supra note 13, p. 28; *ibid*, ‘On the Nature of Language’, supra note 13, p. 84; *ibid*, *Introduction to Metaphysics*, supra note 13, p. 29, p. 56, p. 105, and p. 161.

since Heidegger's call for a non-metaphysical 'ek-sistence [of] the humanity of *homo humanus*',¹⁵² the need for a revolutionary, non-ontological ethics has been urged by many, all in different ways. Levinas, Deleuze and Guattari, Günzel, and Bunch stand among them. Justice, it is usually contended, cannot truly be justice if it is inscribed within humanism's *exclusions*. The discourse on what lies behind the ontological signification of sovereignty or, we may say, on what sovereignty actually is before we '*posit-ively*' represent it¹⁵³ ought to be analysed from this perspective and from what many now see as the exigency of a totally new bio-power theory. Yet as 'nothing' and action are equally inaccessible to scientific thought,¹⁵⁴ any neorealist political measure should leave the terrain of scientific inquiry and move onto that of pure, active experience.

As discussed, Agamben has instead proposed to use our animalisation instrumentally against itself so that humankind may be freed from itself once and for all. The limit of this solution,

See also the second part of *ibid*, *What is Called Thinking?*, supra note 13, p. 10, and pp. 113–244, where Heidegger moves closer to Parmenides' pre-metaphysical and pre-philosophical thinking. Finally, see *ibid*, *Discourse on Thinking*, (John M. Anderson and E. Hans Freund trans., London, 1969 [1959]; *ibid*, 'Logos', in *Early Greek Thinking* (David Farrell Krell & Franz. A. Capuzzi trans., London, 1984 [1951], pp. 59–78; *ibid*, 'Language', supra note 13; *ibid*, 'What is Metaphysics?', supra note 90, p. 110; *ibid*, 'The End of Philosophy and the Task of Thinking', supra note 90, pp. 432–33, and 443–44; *ibid*, *Parmenides*, supra note 13. See also supra note 114.

¹⁵¹ Heidegger, *Identity and Difference*, supra note 13, pp. 42–74. See also *ibid*, 'The Word of Nietzsche', supra note 12, p. 55; *ibid*, 'The Age of World Picture', in *The Question Concerning Technology*, supra note 13, p. 143, *ibid*, *Introduction to Metaphysics*, supra note 13, p. 17 and p. 19; *ibid*, 'Letter on Humanism', supra note 12, p. 251.

¹⁵² Heidegger, 'Letter on Humanism', supra note 13, p. 254.

¹⁵³ C. MONAGLE & D. VARDOULAKIS (eds.), *The Politics of Nothing: On Sovereignty*, London, 2012. To be compared to Heidegger's preoccupation with 'Nothing' See Heidegger, *Introduction to Metaphysics*, supra note 13, pp. 26–44; *ibid*, 'What is Metaphysics?', supra note 90.

Sovereignty, Derrida taught us, acts silently. As such, its signification always reveals the presence of an absence. See Derrida, supra note 92, pp. 100–1.

It is worth noting that in the English translation of *Being and Time*, the term 'nothing' is rendered as 'Nullity', which is a term that Heidegger uses in *Introduction to Metaphysics*. See Heidegger, *Being and Time*, supra note 91, pp. 329–31; *ibid*, *Introduction to Metaphysics*, supra note 13, p. 26. Cf. also Heidegger, *The Event*, supra note 13, 113. Agamben efficiently translates it as 'negativity', in Agamben, *Language and Death*, supra note 45, p. 2.

¹⁵⁴ Heidegger, 'What is Metaphysics?', supra note 90, p. 96.

however, is that its key features are purely metaphysical.¹⁵⁵ In this sense, although the claim that anarchy ‘is the very condition for doing politics in an ethical way’¹⁵⁶ may sound fascinating, it seems to me that the challenges brought about by the need for a post-humanist and yet political ethics cannot be met without a juridical roadmap capable of promoting coherence and certainty while also rediscovering what makes us special in our simultaneous uniqueness and plurality in Arendtian terms. In other words, instead of opting for an anarchical agenda and pushing it to utopic limits, the first step along our *awakening* should take the form of a neorealist critique of the ‘form-of-(non-)life’ prompted by the metaphysical and ontological order of systematic totality as endorsed by the liberal world-view and further ‘*norm*-alised’ by legal positivists.

¹⁵⁵ Agamben is well-aware of this. See Agamben, *Language and Death*, supra note 46, p. 39 and p. 86.

¹⁵⁶ S. NEWMAN, ‘Anarchism and Law: Towards a Post-Anarchist Ethics of Disobedience’ (2012) 2(1) *Griffith Law Review* 307, 315.